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In the

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1962

No. 539

IN RE: INITIATIVE PETITION No. 271,
STATE QUESTION No. 408.

M. A. PRICE, JOHN M. RASBERRY and J. R. HUTCHENS,
Petitioners,
VERSUS
WILLIAM N. CHRISTIAN, Secretary of State of the State of Oklahoma, CITIZENS FOR CONSTITUTIONAL RE-APPORTIONMENT AND BRUCE HICKMAN,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF OKLAHOMA

WALT ALLEN,
Chickasha, Oklahoma;

JAS. A. RINEHART,
El Reno, Oklahoma;

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In the
Supreme Court of the United States

OCTOBER TERM, 1962

No. .....

IN RE: INITIATIVE PETITION No. 271,
STATE QUESTION No. 408.

M. A. PRICE, JOHN M. RASBERRY and J. R. HUTCHENS,
Petitioners,

VERSUS

WILLIAM N. CHRISTIAN, Secretary of State of the State of Oklahoma, CITIZENS FOR CONSTITUTIONAL RE-APPORTIONMENT AND BRUCE HICKMAN,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF OKLAHOMA

To the Honorable, The Chief Justice and Associate Justices of The Supreme Court of the United States:

M. A. Price, John M. Rasberry and J. R. Hutchens, petitioners herein, pray that a writ of certiorari issue to review the judgment entered by the Supreme Court of the State of Oklahoma on the 16th day of July, 1962.

OFFICIAL REPORT

The official report of the opinion of the Supreme Court of the State of Oklahoma, herein sought reviewed, appears at 373 P.2d 1017. A copy of said opinion is appended hereto.

JURISDICTION

The judgment of the Supreme Court of the State of Oklahoma herein sought to be reviewed was dated and filed on the 16th day of July, 1962.

On the 23rd day of July, 1962, the Supreme Court of the State of Oklahoma entered an order denying petitioners' Petition for Rehearing and Motion for Re-reference.

Jurisdiction to review the aforesaid judgment by writ of certiorari is conferred on the Supreme Court of the United States by 28 U.S.C., Sec. 1257.

QUESTIONS PRESENTED

The questions herein presented for review are:

1. Does the judgment of the Supreme Court of the State of Oklahoma in an original action therein (which said Court has determined to be judicial in nature) determining the sufficiency of the number of qualified signers of an initiative petition after intentionally and arbitrarily refusing to hold a hearing thereon deny petitioners due process of law and equal protection of the laws guaranteed by the Constitution of the United States?

2. Have petitioners been deprived of property by virtue of the aforesaid denial of due process of law and of equal protection of the laws which results in the expenditure of funds of the State of Oklahoma (in which said funds petitioners have an equitable ownership) for the holding of an election upon the initiative petition in question?

CONSTITUTIONAL AND STATUTORY PROVISIONS

This case involves the following:

United States Constitution, Amendment XIV, Sec. 1:

". . . nor shall any State deprive any person of life, liberty, or property, without due process of law; nor

deny to any person within its jurisdiction the equal protection of the laws."

Oklahoma Constitution, Article 5, Section 2:

"The first power reserved by the people is the initiative . . . and fifteen per centum of the legal voters shall have the right to propose amendments to the Constitution by petition . . ."

34 Oklahoma Statutes 1961, Sec. 8:

"When a citizen or citizens desire to circulate a petition initiating a proposition of any nature, whether to become a statute law or an amendment to the Constitution, or for the purpose of invoking a referendum upon legislative enactments, such citizen or citizens shall, when such petition is prepared, and before the same is circulated or signed by electors, file a true and exact copy of same in the office of the Secretary of State and, within ninety days after such filing of an initiative petition, the signed copies thereof shall be filed with the Secretary of State, but the signed copies of a referendum petition shall be filed with the Secretary of State within ninety days after the adjournment of the legislature enacting the measure on which the referendum is invoked. Any petition not filed in accordance with this provision shall not be considered. When such original petition is filed in said office it shall be the duty of the Secretary of State to forthwith cause to be published in at least one newspaper of general circulation within the State a notice setting forth the date of such filing. Any citizen of the State may, within ten days, by written notice to the Secretary of State and to the party or parties who filed such petition, protest against the same. The Secretary of State shall then fix a day, not less than ten days

thereafter, at which time he will hear testimony and arguments for and against the sufficiency of such petition. A protest filed by anyone hereunder may, if abandoned by the party filing same, be revived within five days by any other citizen. After such hearing the Secretary of State shall decide whether such petition be in form as required by the statutes, and his decision shall be subject to appeal to the Supreme Court of the State, and such court shall give such cause precedence over all others. Provided, such appeal must be taken within ten days after the decision of the Secretary of State has been made. If the court be at the time adjourned, the Chief Justice shall immediately convene the same for such hearing. It shall be the duty of the appellants to serve notice upon the Secretary of State, in writing, of such an appeal. Whereupon, said Secretary of State shall immediately transmit all papers and documents on file in his office relating to such petition to such court. If the court shall adjudge such petition insufficient, the parties responsible for same shall have the right to correct or amend their petition to conform to the opinion of the court, provided said amendment or change is made within five days. No objection to the sufficiency shall be considered unless the same shall have been made and filed as herein provided."

STATEMENT OF THE CASE

This action was instituted by petitioners filing their Petition on Appeal with the Supreme Court of the State of Oklahoma whereby the question of the sufficiency of Initiative Petition No. 271 was put in issue. The Secretary of State of the State of Oklahoma had certified that the petition contained 219,698 signatures of legal voters of the State.

The Supreme Court of the State of Oklahoma then entered its order (R. 7) referring the case to its referee "for a trial de novo." No report was filed by the referee with the Court.

Thereafter the Court entered its order (R. 15) that "the order of reference be withdrawn and canceled" and ordered briefs submitted on the legal questions "aside and separate and apart from the sufficiency of the number of signers on said petition." Briefs were then submitted and arguments heard upon all questions in issue EXCEPT the sufficiency of the number of signers of the petition. The Court then filed its opinion holding, in Syllabus No 3 "Initiative Petition No. 271, State Question No. 408, reviewed and examined and held sufficient" (R. 16) and stating in the body of the opinion:

> "A review of the entire petition discloses that it is sufficient as to form, sufficient under the law and contains sufficient valid signatures". (R. 20).

The federal question herein sought to be reviewed was then raised by petitioners' Petition for Rehearing and Motion for Re-reference, stating:

> ". . . the opinion rendered herein on the 16th day of July, 1962, operates effectively to deny to the Appellants [Petitioners] due process of law and equal protection of the laws contrary to the provisions of the Constitution of the United States, Amendment XIV and thereby to deprive these Appellants of their liberty and civil right to a fair and impartial hearing upon the sufficiency of the number of qualified signers of the purported initiative petition designated as Initiative Petition No. 271 . . ." (R. 22).

The said Petition for Rehearing further pointed out specifically that the Court had not held a hearing and had no evidence before it upon which to base its findings as to the number of valid signatures on Initiative Petition No. 271 (R. 23); and prayed that that issue be re-referred to the referee "or that other judicial provisions be made" for determination thereof.

The said Petition for Rehearing and Motion for Re-reference was denied (R. 26).

ARGUMENT

There are two basic issues included in the questions presented for review herein. The first is whether the highest court of a state, in an original action judicial in nature, can constitutionally determine a fact question in controversy after intentionally and arbitrarily refusing to hold a hearing at which evidence upon that question could be presented. The second issue is whether the petitioners' right to a judicial determination of the aforesaid fact question (the number of signatures of legal voters appearing on Initiative Petition No. 271) is a right protected by the United States Constitution, Amendment XIV.

Certiorari should be granted herein and these issues decided because of the fundamental importance of the principles involved. Original actions in the courts of last resort have become more and more numerous in recent years in Oklahoma and throughout the United States.

Decisions of this Court, hereinafter cited, have outlined the requirements of due process in the determination of fact questions. However, our research has not disclosed

a decision of this Court applying those principles to the action of a state's highest court which decides questions of fact, in an original judicial action, without any facts officially adduced in the action.

As is shown by the procedure followed in this case, outlined above, the state court apparently adopted the practice of making up its rules as it goes along with regard to fact questions. A decision in this case would serve to eliminate that dangerous practice, one destructive of the very concept of administration of justice and of the judicial process.

The case below was an original action in the Supreme Court of the State of Oklahoma. Although the terms "Appeal" and "Appellants" are used, the case is an original judicial action, tried *de novo,* and not an appeal. *In re Initiative Petition No. 23, State Question No. 38*, 35 Okla. 49, 127 Pac. 862.

It is clear that in order to constitute due process of law, the trier of fact must afford litigants a hearing with the opportunity to present evidence upon the fact question in issue. *Morgan* v. *United States*, 304 U.S. 1, 58 S.Ct. 773, 82 L.Ed. 1129. The Court stated the rule succinctly in *Postal Telegraph Cable Co.* v. *City of Newport, Ky.*, 247 U.S. 464, 38 S. Ct. 566, 62 L. Ed. 1215, "The opportunity to be heard is an essential requisite of due process of law in judicial proceedings."

The guarantee of the Fourteenth Amendment is held to be that each litigant be treated in accordance with the "rudiments of fair play." *Morgan* v. *United States, supra,*

p. 7; *Ohio Bell Telephone Co.* v. *Public Utilities Commission of Ohio*, 301 U.S. 292, 57 S. Ct. 724, 81 L. Ed. 1093.

In this case, the Supreme Court of Oklahoma simply did not hold any hearing at all upon the fact question in issue. The case was first referred to a referee. No report was filed by the referee. The reference was then *withdrawn*, briefs were ordered submitted on the *other* issues in the case and then the Court entered its ruling upon the factual question without any evidence before it upon which such ruling could have been based. We submit that the procedure followed in the case clearly does not follow the rudiments of fair play guaranteed by the Fourteenth Amendment.

The Court's refusal to hold a hearing upon the fact question presented was clearly both intentional and arbitrary. The intent is clearly shown by the language used in the order withdrawing and canceling the reference wherein the parties were directed to brief all other questions "aside and separate and apart" from the fact question presented.

That such action was arbitrary hardly can be denied. In each initiative petition case in the Supreme Court of Oklahoma since *In re Initiative Petition No. 23, State Question No. 38, supra*, p. 7, with the sole exception of this case, that Court has held a hearing or hearings upon the question of the sufficiency of the number of signatures upon the petition in question. See *In re Initiative Petition No. 158, State Question No. 229*, 188 Okla. 111, 106 P.2d 786 and *In re Initiative Petition No. 249*, 203 Okla. 438, 222 P.2d 1032.

This is not a case in which the Court decided to change the law, but rather one in which the Court arbitrarily and intentionally chose to decide a question of fact without holding a hearing. The Court thus denied petitioners due process of law and the equal protection of the laws as guaranteed by the Fourteenth Amendment.

Such action constitutes a denial of equal protection of the laws with the same effect as though the Legislature had passed a statute providing that everyone in petitioners' circumstances, except petitioners, would be entitled to a hearing. As stated in *Truax* v. *Corrigan*, 257 U.S. 312, 42 S. Ct. 124, 66 L. Ed. 254:

> "It is beside the point to say that plaintiffs had no vested right in equity relief, and that taking it away does not deprive them of due process of law. If, as is asserted, the granting of equitable remedies falls within the police power, and is a matter which the legislature may vary as its judgment and discretion shall dictate, this does not meet the objection under the equality clause which forbids the granting of equitable relief to one man and the denying of it to another under like circumstances and in the same territorial jurisdiction."

Petitioners are residents and taxpayers of the State of Oklahoma as alleged in their Petition for Rehearing (R. 22). Oklahoma holds that resident taxpayers have an equitable ownership in the funds of the State. *Vette* v. *Childers*, 102 Okla. 140, 228 Pac. 145. The action of the Oklahoma Supreme Court in determining the sufficiency of Initiative Petition No. 271 results in the holding of an election thereon at the State's expense, thereby depleting the State's funds to that extent and thus depriving petitioners of property without due process of law.

Since the rule in Oklahoma establishes petitioners' equitable ownership in the funds of the State, the unauthorized expenditure thereof as a result of the denial of petitioners' federal constitutional rights clearly is a deprivation of their property rights within the meaning of the Fourteenth Amendment.

Petitioners respectfully pray that a writ of certiorari issue herein and that the judgment of the Supreme Court of the State of Oklahoma be reversed.

Respectfully submitted,

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APPENDIX

OPINION OF THE COURT BELOW

IN THE SUPREME COURT OF THE STATE OF OKLAHOMA

In re: Initiative Petition No. 271 State Question No. 408	)	
M. A. Price, John M. Rasberry, J. R. Hutchens and Roy Grimes	)	
Appellants	)	No. 40,043
vs	)	
William N. Christian, Secretary of State of the State of Oklahoma	)	
Appellee	)	

SYLLABUS

1. The submission of Initiative Petition No. 266, State Question No. 397, amending the Constitution as to the reapportionment of the legislature did not prevent the validity of Initiative Petition 271, State Question No. 408, on the ground that it must contain 25 per cent of the legal voters as provided by Art. 5, Sec. 6 of the Oklahoma Constitution as the two initiative petitions involve measures that are substantially different.

2. Initiative Petition No. 271, State Question No. 408 does not violate Art. 24, Sec. 1, of the Oklahoma Constitution which provides that more than one subject cannot be submitted as an amendment to the Constitution.

3. Initiative Petition No. 271, State Question No. 408, reviewed and examined and held sufficient.

* * * * * * *

Original action brought by M. A. Price, John M. Rasberry, J. R. Hutchens and Roy Grimes as protestants and

appellants to review the order of the Secretary of State declaring valid Initiative Petition No. 271, State Question No. 408.

* * * * * * * *

PETITION DECLARED SUFFICIENT

* * * * * * * *

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James A. Rinehart, El Reno, Oklahoma
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For Appellee

* * * * * * * *

DAVISON, J.

This proceeding was commenced by M. A. Price, John M. Rasberry, J. R. Hutchens and Roy Grimes as protestants and appellants under the provisions of 34 O.S. 1961, Section 8, to review the order of the Secretary of State declaring valid and sufficient Initiative Petition No. 271, State Question No. 408, which has for its purpose the amendment to the Constitution of Oklahoma relating to reapportionment of the State Legislature. The completed petition was filed with the Secretary of State December 27, 1961. The Secretary of State counted as valid 219,686 signatures. Only 135,472 legal signatures were necessary to validate the petition.

On March 20, 1962, the Secretary of State entered an order finding the petition sufficient. The petition was filed in this Court March 27, 1962, and was referred to a Referee of the Court March 28, 1962. The cause was set by the

Referee for hearing on April 2, 1962, and at the request of the protestants was continued for 30 days, being set for May 2, 1962.

Protestants introduced evidence of certain irregularities affecting approximately 7,000 purported signers. The protestants then asked for a continuance and further continuance was denied by the Referee, whereupon protestants filed a motion for continuance with the Court which motion was set for oral argument on May 28, 1962. The Court denied any further continuances and directed that briefs be filed.

The Court finds that the protestants have failed to make any substantial showing that there could be any probable defect in sufficient signatures to invalidate the petition in so far as the required number of signers is concerned and finds that the petition contains in excess of 135,472 valid signatures, the required number for its sufficiency.

In its order to brief the Court authorized and directed submission of questions pointing out any defects in the petition other than the number of signers required.

Protestants have filed a brief and first argue that Initiative Petition No. 266, State Question 397, which was submitted in 1960 and defeated at a special election prevents the consideration and validity of the present petition because of the provisions of Art. 5, Section 6, of the Constitution of Oklahoma. That provision is as follows:

> "Any measure rejected by the people, through the powers of the initiative and referendum, cannot be again proposed by the initiative within three years thereafter by less than twenty-five per centum of the legal voters."

If it is determined that the two measures are substantially the same there would then be insufficient signatures to

validate the present petition because of the above constitutional limitation.

Protestants rely on Commonwealth ex rel Margiotti, Atty. Gen. v. Lawrence, 326 Pa. 526, 193 A. 46. In Armstrong v. King, 281 Pa. 207, 126 A. 263, the Supreme Court of Pennsylvania in discussing the right to amend the constitution of that state held that no amendment of any nature could be presented within five years. In Commonwealth v. Lawrence, supra, the Supreme Court of Pennsylvania stated that since the amendment involved in Armstrong v. King, supra, and the former amendment involved increased the debt limit of the State of Pennsylvania the opinion was correct in its conclusion; but the Supreme Court modified the rule announced in Armstrong v. King and held that the five year limitation applied only to articles of the constitution similar in nature. Therein the court stated:

> "* * * Thus understood it means that after a particular amendment, or amendments, has been once submitted another like amendment, or one similar in substance, to the same article cannot be proposed within five years. * * *"

The prohibition in the Pennsylvania Constitution and Art. 5, Sec. 6, supra, are different at least in the respect that our constitutional provision is against the resubmission of any measure and is not limited to constitutional provisions alone. We think that "measure" under our Constitution is to be viewed in a different light to that of the Pennsylvania provision. If the measure differs substantially as to form and purpose it is not the same measure Initiative Petition No. 266, supra, had for its purpose a radical change in the provisions of our Constitution as to reapportionment.

Initiative Petition No. 266 differs from the present petition in a number of different details, some of the differ-

ences being, (1) that the former petition guaranteed each county a representative while the present petition does not make such a guarantee; (2) the former petition re-wrote and amended Sections 9, 9(a), 9(b) and 10 of Article 5, while the present petition does not make such amendments; (3) the former petition removed the limit of seven House members per county while the present petition retains the limit of seven members for any one county; (4) the former petition has the effect of creating a larger number of House members than does the present petition; (5) the present petition would create the vehicle for a larger number of Senators being elected while the former petition would limit the Senate to 48 members; (6) the former petition contains more than twice as many words as the present one; (7) the present petition restricts appeals to be perfected only by a qualified elector while under the former petition an appeal could be made by a citizen.

We are of the opinion and hold that the present initiative petition submits to the people a substantially different measure from that submitted by Initiative Petition No. 266, supra, and its submission is not prohibited or governed by Art. 5, Sec. 6, supra, of the Oklahoma Constitution.

Protestants next argue that the submission of the present initiative petition would be unconstitutional under Art. 24, Sec. 1, of the Oklahoma Constitution which provides that not more than one subject may be presented in a proposed amendment to the Constitution. We do not agree. The initiative petition embraces one general subject, the reapportionment of the legislature, as provided by the Constitution of the State of Oklahoma. All the other provisions, such as setting up a committee for its enforcement, are supplemental to the general purpose. No cases in point are cited by protestants on this issue. Reference is made to only two instances in which any other than reappor-

tioning is treated. One is the provision for the committee consisting of the Attorney General, the Secretary of State and the State Treasurer, who shall reapportion under the provisions of the initiative petition and the provision on filing of candidates for legislative offices with the State Election Board instead of the Secretary of the Election Board. These are incidental to the general plan of reapportionment. The petitioners cite State v. Helmer, 169 Minn. 221, 211 N.W. 3. That case involved a restriction placed upon enactments by the legislature and involved an act of the Legislature of Minnesota which changed the law relating to personal property. It is similar to the rule announced in Adams v. Iten Biscuit Co., 63 Okl. 52, 162 P. 938, involving the enactment of the Workmen's Compensation Act. In Rupe v. Shaw, Okl., 286 P.2d 1094, it is stated that this provision of the Constitution is to receive a liberal rather than a narrow or technical construction. It is a cardinal rule that such a restrictive provision shall not be so construed as to hamper and unreasonably restrict legislation. Coe v. State Election Board, 203 Okl. 356, 221 P.2d 774; Cornell v. McAlister, 121 Okl. 285, 249 P. 959. We therefore hold that the present petition submits only one general subject, the reapportionment of the legislature under the Constitution, and does not violate Art. 24, Sec. 1, of the Oklahoma Constitution.

A review of the entire petition discloses that it is sufficient as to form, sufficient under the law and contains sufficient valid signatures.

The petition is therefore declared sufficient.

ORDER WITHDRAWING REFERENCE

IN THE SUPREME COURT OF THE STATE OF OKLAHOMA

In re: Initiative Petition No. 271 State Question No. 408.	)	
M. A. Price, John M. Rasberry, J. R. Hutchens and Roy Grimes	)	
Appellants	)	No. 40043
vs	)	
William N. Christian, Secretary of State of the State of Oklahoma	)	
Appellee	)	

O R D E R

It appearing to the court that by reason of the action on the application of protestants filed May 9, 1962, it is no longer necessary to determine the sufficiency of the number of names on the initiative petition and it further appearing to the Court that there remains only legal questions presented to the court;

It is therefore the order of the court that the order of reference be withdrawn and canceled, whereupon this court takes judicial notice of the Special Election held on Initiative Petition No. 266, State Question No. 397, and all the proceedings and results of said Special Election and directs the parties to proceed to brief the legal questions aside and separate and apart from the sufficiency of the number of signers on said petition and for that purpose the contestants are given 30 days in which to file a brief and the brief of the petitioners to be filed within 10 days thereafter.

DONE BY ORDER AND DIRECTION OF THE SUPREME COURT IN CONFERENCE this 31st day of May, 1962.

/s/ BEN T. WILLIAMS
Chief Justice

[APPENDIX]

ORDER OF THE SECRETARY OF STATE OF THE STATE OF OKLAHOMA

BEFORE THE SECRETARY OF STATE OF THE STATE OF OKLAHOMA

IN RE: State Question No. 408
Initiative Petition No. 271

ORDER OF THE SECRETARY OF STATE

This matter came on for hearing before the Secretary of State of the State of Oklahoma, on the 20th day of March, 1962, at which hearing the proponents appeared by Norman Reynolds, and his attorney, and the protestants appeared by their attorneys, Leon Hirsh and Paul Johanning.

The Secretary of State finds that said State Question No. 408, Initiative Petition No. 271 was filed in the office of the Secretary of State on December 27, 1961; that said petition purportedly contained 217,698 signatures. That thereafter, and within proper time, a protest as to the sufficiency of said petition was filed by M. A. Price, John M. Rasberry, J. R. Hutchens and Roy Grimes.

That hearings on said protest have been continued from time to time to allow protestants to make an examination of said petition, and after completion of such examination, said protest finally came on for hearing on said 20th day of March, 1962.

After hearing the testimony presented, and arguments of counsel, the matter was submitted to the Secretary of State, whereupon the Secretary of State made an examination of the said petition, the pamphlets comprising said petition, and the signatures therein contained.

Now, therefore, the Secretary of State finds and holds that the protest as to the sufficiency of said petition should be overruled and denied, and the sufficiency of the said petition is hereby sustained.

Dated this 20th day of March, 1962.

/s/ WILLIAM N. CHRISTIAN
Secretary of State of the
State of Oklahoma.